BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FERNANDO RODRIGUEZ	)	
Claimant	)	
	)	
VS.	)	
	)	
CHEYENNE DRILLING, LP	)	
Respondent	)	Docket No. 1,036,618
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance company (respondent) requests review of the November 7, 2007 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) awarded claimant benefits after he concluded that the "going and coming" rule set forth in K.S.A. 44-508(f) did not apply to the instant set of facts.

The respondent requests review of this Order arguing that claimant's injuries stemming from an automobile accident did not arise out of or in the course of his employment with respondent. Simply put, respondent contends that claimant was injured while driving back at the end of his work day to his temporary dwelling where he resided while assigned to the work site in northeast New Mexico. And pursuant to K.S.A. 44-508(f) and the Court of Appeals' ruling in *Butera*[1], claimant's injuries were not compensable because he was merely traveling to his dwelling at the time of the accident. Thus,

[1] *Butera v. Fluor Daniel Construction Corp.*, 28 Kan. App.2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

respondent maintains the ALJ's Order should be reversed and all benefits should be denied.

Conversely, claimant argues that the ALJ's analysis was correct. Travel was inherent in claimant's job as a derrick hand and at the time of his accident, he was within the scope and course of his employment traveling to the company owned trailer. Claimant asks that the Board affirm the ALJ's Order in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order succinctly and correctly set forth the pertinent facts in this matter.

> On July 28, 2007, the [c]laimant was injured in a car wreck while traveling between a drilling rig in northeast New Mexico and his quarters in northwest Texas. He was working on a rig owned by the [r]espondent whose home office is in Garden City, Kansas. The [c]laimant's home is in Lakin, Kansas.
>
> The [c]laimant's work as a derrick hand required him to work at various temporary work sites in Kansas, Oklahoma, Texas, Colorado, and New Mexico. The [r]espondent did not hire local crews to work on these rigs but hired permanent crews to work traveling from state to state and job site to job site. The employees were paid a per diem of $40 a day, and they provided their own transportation. The [c]laimant and other crew members were staying in Dalhart, Texas, in a trailer owned by the [r]espondent.

The ALJ went on to conclude:

> This Court finds that traveling to and from the drilling rig in New Mexico is an integral part of the employment and inherent in the nature of the employment as a drilling rig derrick hand. K.S.A. 44-508(f) does not apply. See: [*Messenger v. Sage Drilling*, 9 Kan. App. 2d 435, Syl. 2, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984)].

Respondent appealed the ALJ's Order and contends that recent case law, particularly *Butera*[2], compel the Board to reverse the ALJ's decision. Respondent suggests that under the *Butera* rationale, claimant's voluntary relocation to a trailer closer to the work site meant that his daily commute was no more than any other employee would encounter. And as such, his vehicular accident on the way to the company-owned trailer at the end of his work day was not a compensable event. In support of this argument respondent

[2] *Id.*, 28 Kan. App.2d 542, 18 P.3d 278 (2001).

offers the fact that claimant is not provided transportation to the work site, he is not provided with any sort of mileage and the daily per diem he is paid is contractually intended to be used for items other than gas or commuting expenses. Accordingly, respondent maintains that this factual scenario is more like the one present in *Gonzalez*[3], a case where the Board denied compensation to an employee who was temporarily living in Topeka working at a power plant and was killed on the way to his temporary home from his workplace. Respondent also suggests that travel was not required of claimant and that he could have worked at the local office had he wanted to. Thus, travel was not inherent in claimant's job.

The facts surrounding this claim are undisputed. Respondent is an oil drilling company located in Garden City, Kansas. Respondent hired claimant to work as an oilfield worker and assigned him to work at various sites in Texas, New Mexico, Kansas, Oklahoma and Colorado. He had no permanent work location and his assignments would last various periods of time.

Respondent did not provide transportation for its employees to these remote work sites. Instead, employees (such as claimant) are provided a daily per diem that is expressly *not* intended to be used for transportation costs. It is to be used to reimburse employees for the cost of meals and incidental expenses. In addition to the per diem rate, claimant was paid an hourly rate for actual hours worked on the drilling site, excluding any driving time. Respondent did, however, provide claimant a trailer to live in while working at the Clayton, New Mexico site near the Texas border. His vehicular accident occurred as claimant was driving to this trailer after his shift was completed. He was not on the clock nor was he being paid his mileage. He was, nonetheless, traveling to the company owned trailer where he resided while on this remote location.

The ALJ concluded that travel was inherent in the nature of claimant's employment and therefore he was entitled to benefits. This Board Member concludes this decision should be reversed under the Court of Appeals' analysis set forth in *Butera*. In *Butera*, the injured employee was assigned to work at a nuclear plant hundreds of miles from his home. He relocated to a hotel within 30 minutes of the nuclear plant, traveling each day to the plant to work and returning each evening to his temporary dwelling. The *Butera* Court concluded that claimant's commute from the hotel to the job site did not expose him to any further risk than any other employee and that while he had to drive to the job site, travel was not inherent in his job.[4] Although the travel from his home to the temporary dwelling location would fall within the course and scope of his employment, travel from the job site to the temporary dwelling did not.

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[3] *Gonzalez v. F&H Insulation, Inc.*, Docket No. 1,015,837, 2005 WL 1365165 (Kan. WCAB May 26, 2005).

[4] *Butera*, 28 Kan. App.2d 542.

Given this analysis, this member of the Board finds that claimant's accident is not compensable. Like the claimant in *Butera* and in *Gonzales*[5], claimant had temporarily relocated to the trailer in Texas and was traveling between the work site and this trailer. On these trips he was essentially traveling to and from his workplace. Under the Court of Appeals interpretation of K.S.A. 44-508(f) claimant's accident was not compensable. The ALJ's preliminary hearing Order is therefore reversed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[6] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated November 7, 2007, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Stephen L. Brave, Attorney for Claimant
Jon E. Newman, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[5] *Gonzalez v. F&H Insulation, Inc.*, Docket No. 1,015,837, 2005 WL 1365165 (Kan. WCAB May 26, 2005).

[6] K.S.A. 44-534a.